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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

314-697

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers of the WABASH RAILWAY COMPANY, a Corporation,

Petitioners,

vs.

OLIVER S. PERRY,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Petitioners,

vs.

OLIVER S. PERRY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of the Wabash Railway Company, a corporation, respectfully show to the Honorable Court:

STATEMENT OF THE MATTERS INVOLVED.

This is a suit for damages for injuries sustained by respondent when the side door of a freight car fell from its moorings and struck and injured respondent. Respondent was a car inspector employed by petitioners at their railroad yards in Moberly, Missouri. Both parties were engaged in interstate commerce at the time of the injury on July 12, 1939, and the suit was brought and tried under the Federal

Employers' Liability Act, 45 U. S. C. A., Title, "Liability for Injuries to Employees," Chapter 2, Section 51, page 92. Suit for $75,000.00 damages was filed in the District Court of the United States for the Eastern District of Missouri, Eastern Division.

Trial of the case in said District Court resulted in judgment for respondent for $23,500 (R. p. 27). Petitioner appealed to the Circuit Court of Appeals for the Eighth Circuit, which court affirmed the judgment (R. p. 483). Petition for rehearing was denied (R. p. 499), and petitioners bring the case here by this petition for writ of certiorari.

THE FACTS.

Petitioners, as Receivers of the Wabash Railway Company, a corporation, were in possession of, and were managing and operating the Wabash Railway Company, and were in possession of its properties, including the railroad and railroad switch yards in Moberly, Missouri. Petitioners were operating the freight train and railroad switch yards in Moberly, Missouri, in interstate commerce, and respondent was, and for eighteen years had been, in their employ as a car inspector, both petitioners and respondent being engaged in handling and moving interstate commerce at the time of the occurrence complained of.

On July 12, 1939, about 10:35 o'clock p. m., respondent and three other employees of petitioners were attempting to close a side door on Wabash car No. 45034, a freight car, which door was suspended from a track at its top by means of two hangers which operated on rollers or wheels—one at either end of the door—and which were for the purpose of permitting the door to be opened and closed by sliding it back and forth. Respondent, after having first inspected the door and its appliances for the purpose

of determining whether there was any defect that would interfere with the closing of the door, was prying up under the center of it with a crowbar; one of the other employees was pulling on a handle at the front of the door, and the two others were pushing against it from the rear, when the door hangers came off the track at the top and the door fell, striking respondent and causing him to sustain a broken back and other injuries.

The case was tried on respondent's amended complaint (R. pp. 15-17), which alleged that "while he was so at work assisting in attempting to close this door, because and as a result of the negligence, carelessness and unlawful conduct of the defendants, this door was caused to, and did fall from the car" (R. p. 16), there being no other charge of negligence.

The case was submitted to the jury on the theory that the doctrine res ipsa loquitur applied. There was no evidence that the car door, the hangers or the track, or any of the appliances of the door were defective, and no proof that the door was caused to fall by reason of any defect. Neither was there any evidence that petitioners were negligent in any respect.

Petitioners introduced evidence that the door fell when respondent applied the crowbar under the center of it, and they contended that such action on the part of respondent caused the door to fall. Respondent admitted the fact but denied that his act caused the door to fall, and contended that it could not have been pried off the track if it had been in good condition.

The Court charged the jury that "the fact, if it be a fact, that the car door or its supporting appliances were defective caused the door to fall and that the means of knowing what kind of defect, if any, caused the door to fall was exclusively and entirely within the knowledge

and control of the defendant and was not known by plaintiff or readily determinable by plaintiff, then you are instructed that such facts, if you believe them to be true, are sufficient circumstantial evidence to permit a finding by you that the defendant was negligent" (R. pp. 450, 451).

The Court refused to charge the jury that if the plaintiff had control of the door at the time of the occurrence he could not recover, and refused to charge the jury to return a verdict for defendants unless they found that defendants had exclusive charge of the door (R. pp. 401, 402).

On March 14, 1941, the jury returned a verdict finding the issues in favor of respondent and assessing his damages at $23,500.00 (R. pp. 26-27), and on the same day judgment for $23,500 was entered on said verdict (R. p. 27).

Thereafter, and in due time, and on March 18, 1941, petitioners filed their motion for a judgment notwithstanding the verdict, or, in the alternative, for a new trial (R. pp. 463-466), which motion was by the Court overruled on April 7, 1941 (R. p. 466).

Petitioners appealed to the Circuit Court of Appeals for the Eighth Circuit (notice of appeal filed April 12, 1941, R. p. 1; bond on appeal filed April 12, 1941, R. p. 2; designation of defendants of contents of transcript of record on appeal filed April 23, 1941, R. pp. 468-469; appellants' statement of points to be relied upon on appeal, R. pp. 2-4; designation of plaintiff of additional portions of record on appeal filed April 28, 1941, R. pp. 469-470; certificate of the clerk as to the correctness and completeness of the transcript of the record, testimony and proceedings filed May 21, 1941, R. pp. 470-471).

The case was briefed and submitted to the said Circuit

Court of Appeals, and was argued orally before said Court on September 11, 1941.

At the trial of the case in the District Court petitioners complained to said District Court, and in their briefs and oral arguments complained to said Circuit Court of Appeals that the trial court erred in submitting the case to the jury under the doctrine of res ipsa loquitur, and also erred in charging the jury that exclusive knowledge and control by the defendants "of the means of knowing what kind of defect, if any, caused the door to fall" afforded a sufficient basis for a finding that defendants were negligent, when there was no evidence of a defect and no evidence that defendants were negligent.

Petitioners also complained both to the said District Court and to said Circuit Court of Appeals in their briefs and at the oral arguments that there was no evidence in the case from which the jury could have found that defendants had knowledge of any defect in the door, or that they had "exclusive knowledge and control of the means of knowing what caused the door to fall," but that plaintiff had control of the door and its attachments and appliances at the time of the occurrence complained of; that defendants had no means of knowledge except through plaintiff, and that, therefore, the doctrine res ipsa loquitur did not apply.

Petitioners also complained to said District Court and to the said Circuit Court of Appeals, both in their briefs and at the oral arguments, that viewed in the light most favorable to respondent, and giving him the benefit of every inference and intendment that could reasonably be drawn from the evidence, the reason why the door fell was left entirely to speculation and conjecture and that under such circumstances it was error to submit the case to the jury.

Petitioners, in the original brief filed in the said Circuit

Court of Appeals, presented to said Circuit Court of Appeals for its determination the following propositions of law in the following language:

> "1. The Court erred in overruling defendants' motion for a directed verdict at the close of plaintiff's case and again at the close of the whole case.
>
> "(a) This case was pleaded, tried and submitted under the Federal Employers' Liability Act, and therefore the doctrine of res ipsa loquitur does not apply" (Appellants' Brief, p. 26).
>
> "(b) It was plaintiff's duty, as car inspector, to examine and inspect the open door on freight car No. 45034 in order to determine whether the door could be safely closed, and to close the door, or, if it could not be safely closed, order it sent to the repair track for repairs. At the time of the accident complained of, plaintiff was attempting to close the door which struck and injured him, and the door was in his control as car inspector, and not within the exclusive control of defendants. Therefore, the doctrine of res ipsa loquitur does not apply" (Appellants' Brief, pp. 26-27).
>
> "(c) Reliance upon the doctrine of res ipsa loquitur does not in any event relieve plaintiff of the burden of proving negligence on the part of defendants. The evidence fails to show that defendants were guilty of any actionable negligence. Therefore, the evidence was insufficient to justify submission of the case to the jury" (Appellants' Brief, p. 27).
>
> "(d) Viewed in the light most satisfactory to plaintiff, and giving plaintiff the benefit of every reasonable inference and intendment that can be drawn from the evidence, the reason why the door fell is left entirely to speculation and conjecture. Under such circumstances, it was error for the Court to submit the case to the jury" (Appellants' Brief, p. 27).

Petitioners herein, appellants in the Circuit Court of Appeals, cited cases and authorities for each of the above

propositions of law and argued said propositions and complained of them to said Circuit Court of Appeals.

On October 13, 1941, the said Circuit Court of Appeals filed its opinion (Rec. pp. 473-483), in which it held:

> "* * * the fact of the injury itself is deemed to afford sufficient evidence to support recovery in the absence of explanation by the defendant tending to show that the injury was not due to its want of care" (R. p. 477).
>
> " 'That the accident was unusual, there can be no question, and we think it is **probable** that it was the result of negligence rather than pure accident. Under such circumstances the law creates an inference sufficient to carry the case to the jury' " (Rec. p. 479). (Emphasis ours.)

Petitioners argued both in the District Court and in the said Circuit Court of Appeals, and both in their briefs and at the oral arguments, that negligence of defendants could not be inferred from the mere fact that the injury occurred, but that to hold a master responsible under the Federal Employers' Liability Act a servant must show by substantive proof that the appliances furnished were defective, and knowledge of the defect or some omission in regard thereto, and argued that in a case between an employer and employee under the Federal Employers' Liability Act the fact of accident carries with it no presumption of negligence on the part of the employer, but that it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence.

On October 24, 1941, petitioners filed a petition for a rehearing in said Circuit Court of Appeals, in which it again pointed out and complained that the opinion of said Circuit Court of Appeals was erroneous wherein it held that the "fact of injury itself is deemed to afford sufficient evidence to support recovery in the absence of explana-

tion by the defendant tending to show that the injury was not due to its want of care'' (Rec. p. 477).

In their said petition for a rehearing petitioners cited cases and decisions of the Supreme Court of the United States, and of several of the Circuit Courts of Appeals, all agreeing with petitioners' contention, and stating the law to be that negligence of defendant will not be inferred from the mere fact that the injury occurred, but that such negligence is an affirmative fact for the injured employee to establish by evidence.

The said petition for a rehearing was overruled by the said Circuit Court of Appeals on October 30, 1941 (Rec. p. 499).

Petitioners submit that with reference to the propositions of law here mentioned, to wit: As to whether negligence will be inferred in a case under the Federal Employers' Liability Act from the mere fact that the injury occurred, or as to whether the fact of the injury itself is deemed to afford sufficient evidence to support recovery in the absence of explanation, the District Court committed reversible error, and the said Circuit Court of Appeals committed reversible error.

Wherefore, petitioners present to this Honorable Court the following questions:

QUESTIONS PRESENTED.

I.

In a suit arising under the Federal Employers' Liability Act, where the evidence fails to disclose any negligence of the employer, does the mere fact that the employee was injured while pursuing his duties afford sufficient evidence to support recovery in the absence of explanation by the

employer tending to show that the injury was not due to his want of care?

II.

In a suit arising under the Federal Employers' Liability Act, is it correct to submit to a jury the question of whether the "means of knowing" what defect, if any, caused a door to fall "was exclusively and entirely within the knowledge and control of the defendant and was not known by plaintiff or readily determinable by plaintiff," when the undisputed facts show that the plaintiff himself was in actual physical control of the door, and was admittedly employed for the purpose of, and charged with the duty of, inspecting the door to determine whether it could be safely closed?

III.

In a suit brought under the Federal Employers' Liability Act for damages for injuries sustained when the door of a freight car fell on an experienced employee while he was prying up under the center of such door with an iron crowbar as he and three other employees were attempting to close it, and where the injured employee was, and for eighteen years had been, charged with the duty of first inspecting the door, its hangers and attachments, and, second, with the duty of closing such door if, in his opinion, it could be safely closed, does the mere fact that the door fell on such employee and injured him while he was prying up with the crowbar amount to sufficient evidence to support recovery in the absence of explanation by the employer tending to show that the injury was not due to the employer's want of care?

REASONS FOR GRANTING THE WRIT.

I.

There was no evidence in the record from which the jury could reasonably find that the door fell because of any negligence of petitioners, or because of any defect. Under such circumstances the jury verdict was based on pure speculation and conjecture, and the decision of the Court of Appeals that "the fact of the injury itself is deemed to afford sufficient evidence to support recovery in the absence of explanation by the defendant tending to show that the injury was not due to its want of care" is in direct conflict with the decisions of the Supreme Court in **Atchison, Topeka & Santa Fe Railway Co. v. Saxon**, 284 U. S. 458, 459, 76 L. Ed. 397, 398; **Looney v. Metropolitan R. R. Co. et al.**, 200 U. S. 480, 50 L. Ed. 564, 568; **Delaware, Lackawanna & Western R. Co. v. Koske**, 279 U. S. 7, 73 L. Ed. 578; **Patton v. Texas & Pacific Ry. Co.**, 179 U. S. 658, 45 L. Ed. 361; **Chicago, M. & St. P. R. Co. v. Coogan**, 271 U. S. 472, 70 L. Ed. 1041; **Pennsylvania R. Co. v. Chamberlain**, 288 U. S. 333, 77 L. Ed. 819; **Northwestern Pac. R. Co. v. Bobo**, 290 U. S. 499, 78 L. Ed. 462; **Toledo, St. Louis & Western R. R. Co. v. Allen**, 276 U. S. 165, 72 L. Ed. 513; **Atchison, Topeka & Santa Fe Ry. Co. v. Toops**, 281 U. S. 351, 74 L. Ed. 896; **N. Y. Central R. Co. v. Ambrose**, 280 U. S. 486, 74 L. Ed. 562, and **St. Louis-San Francisco R. Co. v. Mills**, 271 U. S. 344, 70 L. Ed. 979.

(a) Said decision of said Circuit Court of Appeals is in direct conflict with the following prior decisions of said Court:

F. W. Martin & Co. v. Cobb (C. C. A. 8), 110 Fed. (2d) 159, 163;

Southern Ry. Co. v. Stewart (C. C. A. 8), 115 Fed. (2d) 317, 322;

Southern Ry. Co. v. Stewart (C. C. A. 8), (on rehearing), 119 Fed. (2d) 85, 89;
Cryder v. Chicago, R. I. & P. Ry. Co. (C. C. A. 8), 152 Fed. 417, 419;
Kyner v. Portland Gold Mining Co. (C. C. A. 8), 184 Fed. 43, 47;
Midland Valley R. Co. v. Fulgham (C. C. A. 8), 181 Fed. 91, 95;
Missouri, K. & T. Ry. Co. v. Foreman et al. (C. C. A. 8), 174 Fed. 377, 381;
Wheelock et al. v. Freiwald (C. C. A. 8), 66 Fed. (2d) 694, 697;
Canadian Northern Ry. Co. v. Walker, 172 Fed. 346, 356;
Northern Pac. Ry. Co. v. Dixon (C. C. A. 8), 139 Fed. 737, 740;
Chicago & N. W. Ry. Co. v. O'Brien (C. C. A. 8), 132 Fed. 593, 596, 597, 598;
Nebraska Bridge Supply & Lumber Co. v. Jeffery (C. C. A. 8), 159 Fed. 609, 611;
Kaemmerling v. Athletic Mining & Smelting Co. (C. C. A. 8), 2 Fed. (2d) 574;
Phillips Petroleum Co. v. Manning (C. C. A. 8), 81 Fed. (2d) 849, 851, 852, 853;
Copeland v. Chicago, B. & Q. R. Co. (C. C. A. 8), 293 Fed. 12.

(b) Said decision of said Circuit Court of Appeals is in direct conflict with the following decisions of other Circuit Courts of Appeals:

(SECOND CIRCUIT)

New England Navigation Co. v. Luliano (C. C. A. 2), 192 Fed. 551, 554;
Schroble v. Lehigh Valley R. Co. (C. C. A. 2), 62 Fed. (2d) 993, 996;
McDonnell v. Oceanic Steam Navigation Co. (C. C. A. 2), 143 Fed. 480, 483.

(THIRD CIRCUIT)

Philadelphia & R. Ry. Co. v. Thirouin (C. C. A. 3), 9 Fed. (2d) 856, 858;
Pennsylvania R. Co. v. Knox (C. C. A. 3), 218 Fed. 748, 753;
Payne v. Buecher (C. C. A. 3), 270 Fed. 38, 40;
Philadelphia & R. Ry. Co. v. Cannon (C. C. A. 3), 296 Fed. 302, 304, 306;
Stepanovich v. Pittsburgh & Baltimore Coal Co. (C. C. A. 3), 218 Fed. 604, 605;
Sierocinski v. E. I. Du Pont deNemours & Co. (C. C. A. 3), 118 Fed. (2d) 531, 535.

(FOURTH CIRCUIT)

Leonard v. Miami Mining Co. (C. C. A. 4), 148 Fed. 827, 828;
James Stewart & Co. v. Newby (C. C. A. 4), 266 Fed. 287, 290;
Colonna v. Merchants & Miners Transportation Co. (C. C. A. 4), 112 Fed. (2d) 612, 615;
Hodges v. Kimball et al. (C. C. A. 4), 104 Fed. 745, 751;
Spain v. Powell et al. (C. C. A. 4), 90 Fed. (2d) 580, 581, 582, 583.

(FIFTH CIRCUIT)

Brown v. Goodyear Yellow Pine Co. (C. C. A. 5), 102 Fed. (2d) 726;
Aqua System, Inc., v. Kodakoski (C. C. A. 5), 88 Fed. (2d) 395, 398;
Bray v. Gulf Stevedoring Co. (C. C. A. 5), 18 Fed. (2d) 411, 412;
Roberts v. L. & N. R. Co., 111 Fed. (2d) 826, 827, 828.

(SIXTH CIRCUIT)

Carpenter v. Baltimore & Ohio R. Co. (C. C. A. 6), 109 Fed. (2d) 375, 378;
Moit v. Illinois Central R. Co. (C. C. A. 6), 153 Fed. 354, 356;

Detroit, G. H. & M. Ry. Co. et al. v. Maldonado (C. C. A. 6), 59 Fed. (2d) 911, 912;
Bush v. Cincinnati Traction Co. (C. C. A. 6), 192 Fed. 241, 244;
Southern Ry. Co. v. Derr (C. C. A. 6), 240 Fed. 73, 74, 76;
Carnegie Steel Co. v. Byers (C. C. A. 6), 149 Fed. 667, 669;
O'Mara v. Pennsylvania R. Co. (C. C. A. 6), 95 Fed. (2d) 762, 763.

(SEVENTH CIRCUIT)

Pierce v. Kile (C. C. A. 7), 80 Fed. 865, 867.

(EIGHTH CIRCUIT)

Cases from Eighth Circuit are cited under paragraph (a) of the first reason for granting the writ.

(NINTH CIRCUIT)

Chicago, M. St. P. & P. R. Co. v. Gilbert (C. C. A. 9), 87 Fed. (2d) 282, 286;
Erickson v. Pacific States Lumber Co. (C. C. A. 9), 18 Fed. (2d) 513, 514;
Lucid v. E. I. Du Pont deNemours Co. (C. C. A. 9), 199 Fed. 377, 378, 379.

(c) Said decision of the Circuit Court of Appeals is in direct conflict with the general law of the states as declared in the following cases:

Seaboard Air Line Ry. Co. v. Hackney, 217 Ala. 382, 115 So. 869;
Southern Pacific Co. v. Gastelum, 36 Ariz. 106, 283 Pac. 719;
Missouri Pacific Co. v. Remel, 185 Ark. 598, 48 S. W. (2d) 548 (c. d. 287 U. S. 634, 77 L. Ed. 550);
Missouri Pacific R. Co. v. Montgomery, 186 Ark. 537, 55 S. W. (2d) 68 (c. d. 289 U. S. 747, 77 L. Ed. 1493);
Mosley v. Raines, 183 Ark. 569, 37 S. W. (2d) 78, 80;

Prichard v. Southern Pac. Co. et al., 9 Cal. App. (2d) 701, 51 Pac. (2d) 426, 427;
Dryden v. Western Pac. R. Co., 1 Calif. App. (2d) 49, 36 Pac. (2d) 394;
Denver & S. L. Ry. Co. v. Mullen, 86 Colo. 159, 279 Pac. 49, 50, 51;
Western & A. R. R. v. Michael, 42 Ga. App. 603, 157 S. E. 226;
Hamilton v. Chicago, B. & Q. R. Co., 211 Iowa 924, 234 N. W. 810, 812, 813;
Brownfield Ry. Co. v. Chic., R. I. & P. Ry., 107 Iowa 254, 77 N. W. 1038;
Degner v. Anderson, 213 Iowa 588, 239 S. W. 790, 791;
Brooks v. Louisville & N. R. Co., 233 Ky. 656, 26 S. W. (2d) 523, 524, 525;
Gibralter Coal Mining Co. v. Collins, 237 Ky. 765, 36 S. W. (2d) 372, 373;
Brooks v. Arnett, 253 Ky. 491, 69 S. W. (2d) 1029, 1030;
Burmaster v. Tex. & P. M. P. Terminal R. of New Orleans, 6 La. App. 778;
Wormell v. R. R. Co., 79 Me. 397, 10 Atl. 49, 1 Am. St. Rep. 321;
Loring v. Maine Cent. R. Co., 129 Me. 369, 152 Atl. 527;
Baltimore Elevator Co. v. Neal, 65 Md. 438, 5 Atl. 338;
Slamin v. New York, N. H. & H. R. Co., 282 Mass. 590, 185 N. E. 353, 354;
Shipp v. Boston & M. R. R. Co., 283 Mass. 266, 186 N. E. 653;
Koetsier v. Cargill Co., 241 Mich. 370, 217 N. W. 51, 52, 53;
Mining Co. v. Kitts, 42 Mich. 41, 3 N. W. 240;
James v. Yazoo & M. V. R. Co., 153 Miss. 776, 121 So. 819;
Brown v. Coley, 168 Miss. 778, 152 So. 61;
Goodyear Yellow Pine Co. v. Clark, 163 Miss. 661, 142 So. 443;

Illinois Central R. R. Co. v. Bowles, 71 Miss. 1003, 15 So. 138;
New Orleans Great Northern R. Co. v. Branton, 167 Miss. 52, 146 So. 870 (c. d. 290 U. S. 667, 78 L. Ed. 577);
Sabol v. St. Louis Cooperage Co., 313 Mo. 527, 282 S. W. 425, 428, 429;
Wagner v. St. Louis-San Francisco Ry. Co., 223 Mo. A. 864, 19 S. W. (2d) 518, 521;
Healy v. Erie R. Co., 259 N. Y. 40, 180 N. E. 888, 890;
Grant v. R. R. Co., 133 N. Y. 659, 31 N. E. 220;
Austin v. So. Ry. Co., 197 N. C. 319, 148 S. E. 446;
Potter v. Atl. Coast Line R. Co., 197 N. C. 17, 147 S. E. 698;
Clinard v. Clinard Electric Co., 192 N. C. 736, 136 S. E. 1;
Cole v. Seaboard Air Line Ry. Co., 199 N. C. 389, 154 S. E. 682 (c. d. 282 U. S. 898, 75 L. Ed. 791);
McGraw v. Southern Ry. Co., 206 N. C. 873, 175 S. E. 286;
Bakkin v. State, 60 N. D. 344, 234 N. W. 513;
Huff v. Austin, 46 Ohio St. 386, 21 N. E. 864, 15 Stat. Rep. 613;
Fisher v. Kansas City, M. & O. Ry. Co., 169 Okla. 282, 36 Pac. (2d) 744;
Bell et al. v. McDonnell, 156 Okla. 68, 9 P. (2d) 735, 736;
Fitzgerald v. Oregon-Washington R. & Nav. Co., 141 Oregon 1, 16 Pac. (2d) 27, 30, 31;
Raftery v. Pittsburgh & W. V. Ry. Co., 284 Pa. 555, 131 Atl. 470;
Dawson v. Reading Co., 283 Pa. 301, 142 Atl. 295 (c. d. 278 U. S. 628, 73 L. Ed. 547);
Wilson v. Atlantic Coast Line R. Co., 134 S. C. 31, 131 S. E. 777;
Louisville & N. R. Co. v. Jackson, 3 Tenn. A. 463;
Hunt v. Robinson, ... Tex. Civ. App. ..., 55 S. W. (2d) 166, 167;

Seaboard Air Line Ry. Co. v. DeLoatch, 149 Va. 338, 141 S. E. 121;
Chesapeake & O. Ry. Co. v. Butler, 163 Va. 626, 177 S. E. 195;
Sowers v. Virginian Ry. Co., 101 W. Va. 582, 133 S. E. 325;
Rupert v. Chicago, M. St. P. & P. R. Co., 202 Wis. 563, 232 N. W. 550 (c. d. 283 U. S. 840, 75 L. Ed. 1451).

(d) Said decision of the said Court of Appeals is violative of the Federal Employers' Liability Act, which is as follows:

> "Section 51. **Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees From Negligence.** Every common carrier by railroad while engaging in commerce between any of the several States or Territories or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. (Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65.)"

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued by this Honorable Court and that

the judgment of the Eighth Circuit Court of Appeals be reversed.

WAYNE ELY,
St. Louis, Mo.,
Solicitor for Petitioners.

N. S. BROWN,
J. H. MILLER,
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St. Louis, Mo.,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion of the Court of Appeals appears at pages 473 to 483 of the record. The order and judgment affirming the order of the District Court is at pages 483 and 484, and the certificate of the Clerk of the Circuit Court of Appeals is at page 504 of the original record filed herewith and at pages 500 and 501 of the other copies filed.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, now being Section 347 (a), Title 28, U. S. Code.

2. The date of the judgment of the trial court is March 14, 1941 (R. p. 27). Motion for judgment notwithstanding the verdict was overruled on April 7, 1941 (R. p. 466). An appeal was duly perfected and there was a judgment in the Circuit Court of Appeals on October 13, 1941 (R. pp. 483-484).

III.

STATEMENT OF THE CASE.

In the petition, at pages 1 to 8, is a full statement of the case, so far as the law and the facts are material to a consideration of the questions here presented. In the interest of brevity this statement is not repeated.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that the fact of the injury to respondent is, in and of itself, deemed to afford sufficient evidence to support recovery.

V.

SUMMARY OF ARGUMENT.

I.

A.

SPECIFICATION OF ERROR.

It conclusively appears from the record that respondent's duties as car inspector included the duty of inspecting the freight car door and its appliances, and of determining from his inspection whether there was any defect which would make it unsafe to attempt to close the door without first having it repaired. If, in the opinion of respondent, the door, or its appliances, was defective and needed repairing, it was his duty to place a "bad order" card on the car and send it to the railroad shop for repairs.

It also appears conclusively from the record that respondent's employers, petitioners herein, had no means of knowing the condition of the door or its appliances, except through respondent.

Furthermore, respondent did inspect the door and its appliances; he discovered nothing wrong; and if there had

been anything wrong with the door that an inspector could have found, he could have found it.

It cannot be disputed, and it is not disputed, that respondent had actual physical control of the door and its appliances, and was prying up under the center of the door when it came loose from its track and fell and struck respondent. Such fact is clearly established by the record.

The record is absolutely silent as to the existence of any defect in the door or its appliances. And if it be surmised that the door fell because of a defect, it was one which respondent himself could not and did not find. If it be assumed, for sake of argument, that a defect existed at the time of the accident, there is no showing that petitioners had any opportunity to discover it, or that they could have discovered it, before the accident by the most careful examination and inspection. The undisputed evidence is that the car door was in good condition at the time and after the train left Kansas City on the morning of the accident, and that it was opened and closed several times without difficulty during that day. The first time the door was found to be open was when the train was at Huntsville, Missouri, seven miles from the railroad yards, at Moberly, where the accident occurred, and no member of the train crew observed any defect at Huntsville, nor at any other time or place. It is admitted that the mere fact that a car door is stuck and will not close is no evidence that it is defective, which fact is declared in the opinion of the Court of Appeals (R. p. 474).

There is no showing that petitioners, or any officer, agent or employee of petitioners, was negligent in any respect, or that respondent's injury resulted in whole or in part from the negligence of any of the officers, agents or employees of petitioners, or by reason of any defect or insufficiency, due

to their negligence, in the cars, doors, appliances or other equipment. Without a showing of negligence there can be no recovery under the Federal Employers' Liability Act.

Therefore, the Court of Appeals erred in holding that "the fact of the injury itself is deemed to afford sufficient evidence to support recovery in the absence of explanation by the defendant tending to show that the injury was not due to its want of care."

The testimony in this case leaves the question unanswered as to why the door fell, and whether it fell because of a latent defect, or whether respondent pried it loose, or whether it fell for some other reason, and where the testimony thus leaves the matter uncertain and shows that the injury may have resulted from some cause for which the employer is responsible, or may have resulted from some cause for which he is not responsible, it is error to permit the jury to guess between the causes.

In holding, under the circumstances disclosed by the record in this case, that the fact of the injury furnishes a sufficient basis for an adjudication of negligence, the opinion of said Circuit Court of Appeals upsets a long line of its own decisions, runs contrary to the decisions of at least eight of the ten circuits, and is in direct conflict with the decisions of the Supreme Court.

> "On such a state of facts the jury should not have been permitted to conjecture * * *. The evidence must at least point to the essential fact which the jury is required to find in order to sustain the verdict."
>
> **St. Louis-San Francisco R. Co. v. Mills,** 271 U. S. 344, 347, 348, 70 L. Ed. 979, 982.

> "And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury * * *, it is not for

the jury to guess between these half a dozen causes and find that the negligence * * * was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

Patton v. Texas & P. R. Co., 179 U. S. 658, 663, 45 L. Ed. 361, 364.

"The record leaves the matter in the realm of speculation and conjecture. That is not enough."

Chicago, Milwaukee & St. Paul R. Co. v. Coogan, 271 U. S. 472, 478, 70 L. Ed. 1041, 1045.

"As often pointed out one who claims under the Federal Act must in some adequate way establish negligence and causal connection between this and the injury."

Atchison, Topeka & Santa Fe Ry. Co. v. Saxon, 284 U. S. 458, 459, 76 L. Ed. 397, 398.

ARGUMENT.

The material facts necessary for a decision of the issues here presented are clear and undisputed. All the facts and occurrences with which we will deal took place on July 12, 1939.

On that day the freight train with which we are here concerned left Kansas City, Missouri, about 7:15 in the morning. It arrived at Moberly, Missouri, some time after 10 o'clock that night. Wabash car 45034 was a part of that train. The distance from Kansas City to Moberly, Missouri, is 125 miles, and the train took fifteen hours or more to make the trip, because it stopped at several stations where cars were loaded and unloaded. The offending door on Wabash car 45034 was opened and closed several times between Kansas City and Huntsville, Missouri, a station between Kansas City and Moberly, and about seven miles west of Moberly. At Huntsville it was noticed that the car door was open, and members of the train crew attempted to close it, but were unable to do so. The crew noticed nothing defective or out of order about the door or its appliances, and as there were no railroad shops at Huntsville, and also as the train crew were not going to leave the train until they got to Moberly, they proceeded on with the door open on Wabash car 45034, and when the train arrived at Moberly one of the members of the train crew, a brakeman, notified respondent that the door was open.

Respondent had been employed as a car inspector at the Moberly railroad yards for more than eighteen years, during all of which time his duties consisted of making so-called "running inspections" of the equipment on trains as the trains moved through the yards, or as they were standing in the yards. His duties also included the inspec-

tion of freight car doors and their appliances, and the closing of open doors. He was called upon to close, or assist in closing, many doors each day—perhaps as many as eighty a day. The mere fact that a door on a freight car was open and was stuck so that it could not be closed without application of an unusual amount of force did not indicate that there was any defect in either the door or its appliances. Sometimes doors on new cars would be stuck. Small pieces of coal, or wood, or other foreign objects, would get under the hanger wheels at the top of a door and would prevent the door from being closed by application of the usual amount of force.

During all of the eighteen years that respondent had worked as a car inspector in said railroad yards, he never closed a door without first inspecting it and its appliances, including the hangers by which the door was suspended from the track over the door opening. If his inspection disclosed any defect that would prevent the closing of a door, or that would make it unsafe to close a door, it was respondent's duty to put a bad order mark on the defective door and send the car to the shop for repairs. If, however, he discovered no defect or other condition that would interfere with the closing of a door, and found nothing that would, in his opinion, make it unsafe for him to close the door, or attempt to close it, by prying on it with an iron crowbar, he would utilize the crowbar in such way as he saw fit, in his efforts to close the door. A crowbar was furnished by the railroad for respondent's use, but whether he would use it, and how he would use it, was a matter that was left entirely to his own judgment. He testified that on the night of July 12th he looked at the door and the door hangers "to see if there should be anything wrong at the top" (Rec. pp. 177, 178); that he looked "to see whether the roller was off the track at the top of the door"; that it was "a customary practice" with

him to do so, and was "a habit formed by inspectors," and "a part of the inspection of cars" (Rec. p. 180). He further testified that before attempting to close a door by prying up on it with a crowbar he "would make my own personal inspection of the hanger and use my own judgment" (Rec. p. 184), in order to determine whether he could safely use the crowbar on the door, or whether he should mark the car "bad order" and send it to the shop for repairs. He testified that it was part of his job as car inspector to determine whether it was safe to close the door before he started to work on it (Rec. p. 189), and if there had been anything wrong with the door that any inspector could have found, he could have found it (Rec. p. 195).

On the night in question respondent, as stated, inspected the door by looking at it and its attachments, including the door hangers and the track at the top of the door opening on which the hangers operated, and saw nothing wrong with the condition of the door or its attachments, and saw nothing to indicate that there was anything wrong with the door or its attachments. To the contrary, the door looked like a good door, and looked all right to him, as far as he could see (Rec. pp. 179 and 183). Respondent testified that the work of inspecting a car required a car inspector to "train his eyes to observe any things and take in the entire contents of the car from the outside appearance" (Rec. p. 180), and over the course of years that he worked as such car inspector he became well acquainted with how snugly a door will fit up against the side of a car when it is in proper shape (Rec. p. 178).

On the night in question, after the brakeman had notified respondent that the car door was open, the first thing he did was to proceed to the car, and, with the help of another inspector and a railroad patrolman, tried to push the door shut with their hands without using a crowbar,

but they were unable to move it. Another train was standing on an adjoining track, and not more than two or three feet away from the train which respondent was inspecting, and respondent and his companions decided they would wait until that other train pulled out before making a further effort to close the door on Wabash car 45034. After the train on the adjoining track had pulled out, respondent and his two companions returned to the car, bringing with them another railroad patrolman, and a further effort was made to close the door. This time the second patrolman climbed on top of the car and shined his flashlight on the hangers, and tapped the hangers with a hammer which respondent loaned him. Respondent remained on the ground.

To this point the evidence is without dispute, and is all a resume of the facts as given in evidence by respondent and the witnesses produced by him.

Petitioners produced as witnesses the car inspector who accompanied respondent, and the two patrolmen. The patrolman who got up on the car and the other inspector testified that when the patrolman shined his flashlight on the hangers at the top of the door he told respondent that one of the hangers was off the track (Rec. pp. 340, 360). The other patrolman was not there at the time, as he had been sent by respondent to get the crowbar from the inspectors' shanty (Rec. pp. 350, 351).

Respondent testified that the patrolman said nothing to him about the hanger being off the track (Rec. p. 182), and, so far as respondent could remember, said nothing at all about what he saw, and nothing about the condition of the door, the hangers, nor the track (Rec. p. 183).

At any rate, the evidence shows that after the patrolman came down from the top of the car respondent took the crowbar and assumed a position at the center of the door.

He then applied the crowbar under the center and pried up on the door while the other car inspector pulled on a handle at the front, and the two patrolmen pushed on the door at the back, and while they were thus engaged the door hangers came entirely off the track and the door fell on respondent, striking him and breaking his back and inflicting other injuries.

We revert to the fact that the only bit of disputed evidence is the dispute about whether the patrolman who went on top of the car told respondent that the hanger was off the track. Every other fact mentioned is undisputed, and there is no testimony anywhere in the record to indicate that any other stated fact is untrue.

We also invite the Court's attention to the fact that there is not one scintilla of evidence that the door, the door hangers, the track on which the hangers operated, or any appliance of the door, was defective in any respect that would contribute, or might have contributed, to cause the door to fall. Neither is there any evidence to be found in the record that petitioners, or any of the officers, agents or employees of the railroad company were negligent in any respect, or that they performed any act or that they did anything, or failed to do anything—negligent or otherwise—that contributed, in any degree, to the fall of the door.

In this state of the record the District Court sent the case to the jury with an instruction that they might find that petitioners were negligent if they found "that the car door or its supporting appliances were defective," that a defect "caused the door to fall and that the means of knowing what kind of defect, if any, caused the door to fall was exclusively and entirely within the knowledge and control of the defendant (petitioners) and was not known by plaintiff (respondent) or readily determinable by plain-

tiff (respondent),'' telling the jury that such ''fact, if it be a fact,'' was ''sufficient circumstantial evidence to permit a finding by you that the defendant (petitioners) was negligent'' (Rec. pp. 450, 451).

On appeal to the Circuit Court of Appeals for the Eighth Circuit, as well as in the District Court, petitioners contended that such an instruction was erroneous; that the undisputed evidence, as disclosed by the record, established conclusively not only that respondent, and not petitioners, was in charge and control of the door, but that petitioners had no ''means of knowledge'' as to the condition of the door, and no way to obtain any knowledge as to its condition except through the respondent himself, who was employed by petitioners for the very purpose of ascertaining the condition of an open car door, and determining whether such open door could be or should be closed, or whether the car should be sent to the repair shop for repairs on the door if its condition was defective.

This case was pleaded, tried, and submitted to the jury on the theory that the doctrine res ipsa loquitur applied. Petitioners contended in the District Court, and in the Circuit Court of Appeals, and still contend that the doctrine cannot be applied under the facts and circumstances shown in this case. And petitioners further contend that even if the evidence presented a case for the application of the rule of res ipsa loquitur, it was improperly applied in this case in that both the District Court and the Circuit Court of Appeals ruled that the mere fact that the door fell, without any showing as to why it fell, constituted evidence that petitioners were negligent. The District Court permitted the jury to find that the door fell because of petitioners' negligence if the jury found ''that the fact, if it be a fact, that the car door or its supporting appliances were defective caused the door to fall, and that the means of knowing what kind of defect, if any, caused the door to

fall was exclusively and entirely within the knowledge of the defendant" (Rec. p. 450), without there being any evidence whatever of a defect in the door or its supporting appliances, and without there being any evidence from which the jury could have found that petitioners had any "means of knowing," before the accident, what caused the door to fall. The Circuit Court of Appeals declared in its opinion that "the fact of the injury itself is deemed to afford sufficient evidence to support recovery in the absence of explanation by the defendant tending to show that the injury was not due to its want of care" (Rec. p. 477), notwithstanding there was no evidence of negligence.

The Federal Employers' Liability Act is not a workmen's compensation act, and an employer is not an insurer under the act. It does not make the employer liable for every injury resulting to an employee while engaged in interstate commerce, but only for an injury "resulting in whole or in part from the **negligence** of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its **negligence**, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment" (U. S. C. A., Title 45, Chapter 2, Sec. 51; Apr. 22, 1908, c. 149, sec. 1, 35 Stat. 65). At the time respondent was injured on July 12, 1939, employees engaged in interstate commerce assumed certain risks of their employment, which fact was recognized by the District Court in its charge to the jury (Rec. pp. 452, 453). The amendment eliminating assumption of risk as a defense in cases arising under the Federal Employers' Liability Act was not adopted until August 11, 1939. Therefore, if the injury to respondent on July 12, 1939, was due to a risk which he assumed, the petitioners would not be liable. Most Circuit Courts of Appeals, including the Eighth Circuit, have heretofore consistently refused to apply the doctrine of res ipsa loquitur in any master

and servant case, whether it arose under the Federal Employers' Liability Act or not. The Circuit Court of Appeals of the Eighth Circuit has been outstanding in its strict adherence to that rule, and in March, 1940, Judge Woodrough, who concurred in the opinion about which we here complain, spoke for the Eighth Circuit Court of Appeals as follows:

> "It is recognized at the outset that prior to the decision of the Supreme Court in Erie v. Tompkins, supra, the federal courts in this and other circuits had followed the declaration of the Supreme Court in Patton v. Texas & Pacific, 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361, and had refused to apply the doctrine of res ipsa loquitur in cases brought on behalf of servants claiming to have suffered injury through the negligence of their masters. This court in passing on such a case said: 'It is settled law that, as between a master and his servant, the maxim "res ipsa loquitur" has no application.' Shandrew v. C. St. P. M. & O. Ry. Co., 8 Cir., 142 F. 320, 323; Latting v. Owasso Mfg. Co., 8 Cir., 148 F. 369; Cryder v. Chicago, R. I. & P. Ry. Co., 8 Cir., 152 F. 417; Midland Valley Ry. Co. v. Fulgham, 8 Cir., 181 F. 91, L. R. A. 1917 E 1; Phillips Petroleum Co. v. Manning, 8 Cir., 81 Fed. (2d) 849."
>
> **F. W. Martin & Co. v. Cobb,** 110 Fed. (2d) 159, 163.

And the Sixth Circuit, which has long held that the doctrine of res ipsa loquitur may be applied in master and servant cases (but only where the accidents speak for themselves, and permit of no other conclusion than that they resulted from negligence of the employer) has thus declared the law in a case arising under the Federal Employers' Liability Act in an opinion by Judge Denison:

> "It has long been established that, in actions by passengers against carriers, the occurrence of an injury (in the usual surroundings) made a prima facie case of negligence; while in actions by employes against

carrier the rule was otherwise. Inasmuch as the fact that many accidents are caused by the negligence of a fellow servant, thus preventing the accrual of a right of action to the injured employe, was one of the reasons for holding that the maxim res ipsa loquitur was not applicable to an action by an employe, and inasmuch as this situation has now been changed by statute in actions under the federal Employers' Liability Act, there is strong ground for saying that the old decisions, to the effect that the maxim can have no application in an employe's action, are not here to be observed. We are quite content to assume the correctness of this position; but, when we concede that the maxim may apply to such an action, it by no means follows that it does apply to the same extent and with the same force as in a passenger action. The distinction is obvious. Passenger actions involve a duty to exercise a very high degree of care, amounting almost to insurance, and the instances where the accident does not depend upon some negligence of the railroad or of some employe are so rare that a general rule may well rest upon the general fact. In an employe's action, the defendant's obligation is only to use ordinary or due care to provide a safe place to work or proper instrumentalities and methods, and **it must be admitted that an unknown, but considerable, fraction of the injuries to employes are either true accidents or assumptions of risk, or are proximately caused only by plaintiff's carelessness**; hence there is, in truth, no such common and dominant probability of negligence as in the passenger cases. We think we give the plaintiff in an employe's case all the benefit of the maxim to which he is entitled when we say that it may apply to aid him; but whether the event does speak, and what it says, depend upon the facts of the particular case."

Southern Ry. Co. v. Derr (C. C. A. 6), 240 Fed. 73, 75, 76.

And the Circuit Court of Appeals for the Eighth Circuit, in an opinion by Judge Walter H. Sanborn, said:

"But the doctrine, 'res ipsa loquitur,' is inapplicable to cases between master and servant brought to recover damages for negligence, because there are many possible causes of accidents during service, **the risk of some of which * * * the servant assumes * * *.** The mere happening of an accident which injures a servant fails to indicate whether it resulted from one of the causes the risk of which is the servant's, or, from one of those the risk of which is the master's; and for this reason it raises no presumption that it was caused by the negligence of the latter. In such cases the burden of proof is always upon him who avers that fact, and a naked finding, as in this case, that the accident occurred and that the servant was guilty of no negligence which contributed to cause his injury, is insufficient to sustain this burden, for there are many other causes than the negligence of the master and that of the servant, such as the negligence of fellow servants and latent and undiscoverable defects in place or machinery, which may have produced it."

Northern Pac. Ry. Co. v. Dixon (C. C. A. 8), 139 Fed. 737, 740.

The above cases, and all the cases cited in support of this petition for certiorari, are but declaratory of the rule announced by the Supreme Court in an opinion by Mr. Justice McKenna:

"To hold a master responsible, a servant must show that the appliances and instrumentalities furnished were defective. A defect cannot be inferred from the mere fact of an injury. There must be some substantive proof of the negligence. Knowledge of the defect or some omission of duty in regard to it must be shown."

Marian J. Looney, Administratrix, v. Metropolitan R. R. Co. et al., 200 U. S. 480, 50 L. Ed. 564, 568.

A leading case, and one which has been often cited by

the Supreme Court, and by the various Circuit Courts of Appeals, as well as by a majority of the state courts, is one in which Mr. Justice Brewer clearly distinguished between the case of a passenger against a railroad, and the case of an employee against a railroad, in the following language:

> "That while, in the case of a passenger, the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely * * *, a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. Rep. 707. Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was."
>
> **Patton v. Texas & Pacific Ry. Co.**, 179 U. S. 658, 663, 45 L. Ed. 361, 364.

Petitioners have shown that there was no evidence of any defect in the car door or its appliances. They have shown that there was no evidence that respondent's injury resulted "in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its (petitioners') negligence, in its cars, * * * appliances, * * * or other equipment." We have shown that without evidence of negligence contributing to respondent's injury, and without evidence of any defect or insufficiency, due to petitioners' negligence, in the car door, or in its appliances or other equipment, the question of whether petitioners

were negligent should not have been submitted to the jury. Further, it is shown by the evidence in this case that the car door and its appliances was not in control of petitioners at the time of the accident, but was in actual physical control of respondent, who was wrenching and prying up on it with a crowbar at the very moment the door fell.

In an almost identical case, where two employees were trying to open a car door, and a plate fell from the top and struck one of them on the head while the other was prying the door with a crowbar, the Circuit Court of Appeals for the Eighth Circuit held that plaintiff did not make out a prima facie case because it was as reasonable to say that the plate was caused to fall by the wrenching of the door against it, as it was to say that it fell because it was not firmly fastened in its mortised bed. **Copeland v. Chicago, B. & Q. R. Co.**, 293 Fed. 12, 16.

As recent as May 7, 1941, we find an opinion written by Judge Gardner, who wrote the opinion in petitioners' case, and concurred in by Judge Thomas, who concurred in the opinion in petitioners' case, wherein the Eighth Circuit Court of Appeals held in an action bottomed upon alleged violation of the Safety Appliance Act (45 U. S. C. A., Sec. 1 et seq.), and brought under the Federal Employers' Liability Act:

> "There was no proof of mechanical defect or insufficiency but only the statement of a witness who says that after the accident he tried to use the pin lifter without stating whether the trial was successful or what effort was included therein. A verdict cannot be permitted to stand which rests wholly upon conjecture or surmise, but must be sustained by substantial evidence. Midland Valley R. Co. v. Fulgham, 8 Cir., 181 F. 91, L. R. A. 1917 E 1.
>
> "There being no substantial evidence to sustain the verdict, the judgment appealed from is reversed and the cause remanded with directions to grant the de-

fendant's motion for judgment in its favor notwithstanding the verdict."

Southern Railway Co. v. Stewart (on rehearing), 119 Fed. (2d) 85, 89.

The complaint in the Stewart case was that "the defendant had violated the provisions of the Federal Safety Appliance Act by furnishing on its line cars used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars."

How can the same Court hold that the mere failure of safety appliances to work properly constitutes no evidence of a defect in such appliances, and constitutes no evidence of negligence, and then hold that negligence may be adjudicated from the mere fact that a door (which is not a safety appliances), came loose from its moorings and fell on a car inspector while he was prying up on the door with an iron crowbar? Such holdings are entirely inconsistent, and the latter holding is inconsistent with and contrary to every pronouncement of that Court prior to May 7, 1941, and with the decisions of the Supreme Court and the other courts of the land.

The cases cited in support of this petition for certiorari are unanimous in their declaration that in cases between master and servant, where the servant alleges negligence, he must prove it. And this is true whether the case be one brought undr the Federal Employers' Liability Act or not. It is also true whether the plaintiff in the case relied upon the doctrine of res ipsa loquitur. That doctrine does not relieve the plaintiff employee of the burden of proof, nor does it have the effect of shifting the burden of proof to the defendant, as was declared in **Sweeney v. Erving**, 228 U. S. 233, 238, 57 F. Ed. 815, 818.

We submit that this case falls in the "peculiar class"

of cases referred to Mr. Justice McReynolds, when he said for the Supreme Court:

> "The cause is one of a peculiar class where we have frequently been obliged to give special consideration to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted.
>
> "Examination of the record convinces us that the Court of Civil Appeals reached the proper conclusion. We can find no evidence from which it may be properly concluded that Moore's traffic death was the result of negligence by the Railway Company. As often pointed out, one who claims under the Federal Act must in some adequate way establish negligence and causal connection between this and the injury. New York C. R. Co. v. Ambrose, 280 U. S. 486, 74 L. Ed. 562, 50 S. Ct. 198; Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 354, 74 L. Ed. 899, 50 S. Ct. 281."
>
> **Atchison, Topeka & Santa Fe Railway Co., v. Saxon,** 284 U. S. 458, 459, 76 L. Ed. 397, 398.

II.

CONCLUSION.

The question here presented is one that has arisen numerous times, and it appears from the Saxon case that the Supreme Court has frequently had occasion to take jurisdiction of cases of this kind in order to afford to railroad companies the protection to which they are entitled under the Federal Employers' Liability Act.

If the decision of the Court of Appeals in this case is permitted to stand, petitioners will suffer an irreparable and unwarranted injury, and much confusion will result from the decision.

Petitioners, therefore, respectfully pray that the petition

for certiorari be granted in this case to the Eighth Circuit Court of Appeals and that the judgment of said Court be reversed.

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Wayne Ely, solicitor for petitioners, certifies that the foregoing petition for certiorari is filed in good faith and is believed to be meritorious.

Dated at St. Louis, Missouri, this 19th day of October, 1941.

Wayne Ely.

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No. 753

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF THE WABASH RAILWAY COMPANY, A CORPORATION, *Petitioners,*

vs.

OLIVER S. PERRY, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING CERTIORARI

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I.

PRELIMINARY STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals of the Eighth Circuit in the above entitled cause. The opinion is reported in 122 F. (2d) 881. The action was brought to recover damages for personal injuries and jurisdiction is predicated upon the Federal Employers' Liability Act (35 Stat. 65, Ch. 149, 45 U. S. C. A., Sec. 51-59).

The petition and brief of the petitioners are so confusing and misleading and contain such a biased partial summary of the evidence as to require a more accurate statement of the essential facts. Petitioners are either unable or unwilling to view the facts in their aspect most favorable to respondent and to allow the latter the benefit of reasonable

inferences deducible therefrom and to recognize that questions of the weight and credibility of testimony are for the jury.

In fact, the application of petitioners is conspicuous for obscuring and minimizing the importance of the vital and determinative facts and emphasizing those of purely collateral import. It is necessary, therefore, to present with appropriate brevity the true and correct picture.

At the outset it should be understood that there is no genuine dispute here involved about legal principles. There is no important principle of law at stake. The principles of law that govern this controversy are clear, undisputed and thoroughly established.

The Question Involved.

The simple question in this case is whether the evidence, tested in the light of principles that are clear and undisputed, was sufficient to warrant the application of *res ipsa loquitur.*

The case resolves around the facts and the evidence exclusively. Simply stated, the sole issue is: Does the factual background invoke the application of the doctrine of *res ipsa loquitur?* The Court below said (R. 477):

> "As defendants' motion for a directed verdict is not contained in the record, we have no way of determining the grounds upon which they predicate that motion, and hence, defendants can not here urge that its denial was prejudicial."

Later in the opinion it was said (R. 481):

> "As previously noted, the record is such that we cannot consider the question of the sufficiency of the evidence but may only consider it in connection with exceptions to the instructions."

We propose to demonstrate in this brief that:

First: No special and important reasons exist that would warrant the issuance of a writ.

Second: There is no federal question of substance involved unless the sufficiency of the evidence to invoke *res ipsa* in every case under the Federal Employers' Liability Act is to be so considered.

Third: The legal principles involved are not in need of alteration or redefinition.

Fourth: And lastly, that the abstract principles of law were properly interpreted and applied to the case at bar by the Circuit Court of Appeals.

Instead of repeating the entire background, we will assume that the members of this Court are familiar with the facts stated clearly and accurately in the opinion below (R. 473-476), and our statement of facts will be supplementary only.

II.

STATEMENT OF FACTS

At about 10:30 P. M., on July 12, 1939, in the yards of petitioners at Moberly, Missouri, it was discovered that a door on a freight car was open. Certain employees had attempted to close the door at a station seven miles west of there but were unsuccessful. The respondent, a car inspector, was assisting three other employees of the petitioners, who were pulling and pushing with their hands in attempting to close this door, when it fell from its fastenings and injured him.

The construction of a car door is such that it cannot come off and fall down unless it is defective. If the door and the attachments are in good condition, a car door will not come off because an employee pries under it with a crowbar, but this will have a tendency to keep it on (R. 63, 66, 67, 272).

Unless the track or the hangers are in bad condition—in fact, unless the wood is so rotten or the bolts so defective as to permit an inch and an eighth (R. 139), or an inch and a quarter (R. 159) of slack, the metal pieces at the top will not disengage (R. 64, 65, 70, 118, 138, 157). This is because of the nature of the metal strips that engage each other at the top and prevent the door from coming out (R. 65). They are three-sixteenths or one-quarter of an inch thick (R. 118). If in good condition, a man cannot break them by prying up with a crowbar at the bottom (R. 70, 118). Either rotten wood or corroded metal would be necessary to permit the door to come off (R. 63-6, 138-9, 157).

A number of employees with twenty-nine and thirty years of experience testified they had never had a car door come off when they were prying upon it with a crowbar, even though the roller would seem to be off at the top (R. 49, 51, 55, 56, 70-1). One good hanger would be enough to keep it on (R. 77-8).

Car doors frequently stick because of being wet, or bulging, or there may be particles of coal or cinders or wood in the hangers or rollers or on the track (R. 49, 59, 77, 191-2). When they stick, it is customary practice for employees to use a crowbar to jar them loose, and the company supplies such a bar for this very purpose (R. 44, 65, 146, 186). By placing the bar underneath and working it up a little, you will release it at the top and permit the door to close (R. 145).

On the occasion in question respondent was using a crowbar and he had pried upwards and was holding the door, while the other three employees were pulling and pushing upon it with their hands. He was using the bar in exactly the same way that he and other employees had been using it for eighteen years without trouble or accidents (R. 146-7). When he took the slack up, he stopped and did not exert any

other pressure (R. 275-6, 364). His testimony that he merely held the bar in place and did not keep on prying was undisputed (R. 157-8, 275-6, 364). There was no visible sagging at the bottom (R. 190) and neither respondent nor any of the other employees believed there was any possibility of an accident (R. 189, 355-6).

The car doors, and particularly the hangers and equipment at the top, are inspected at originating terminals like Kansas City, where the train started that morning, and not at intermediate points like Moberly. At originating terminals they have special equipment and special employees for that purpose (R. 103, 124, 136, 205).

At Moberly the car inspectors made only running inspections (R. 124). A half minute would be allotted to each car in the train for the entire inspection of couplers, wheels, brakes, grabirons, sillsteps and brake rigging (R. 62, 128-9, 133). Car inspectors do not inspect car hangers and the equipment at the top of doors (129, 133, 136, 345).

The co-inspector, Bell, who was working with Perry that night and assisting in the closing of the door, testified (R. 345):

> "Q. Now, was this car door or its various parts or attachments defective?
> A. Not that I know of. I did not examine it.
> Q. Did you make any inquiry to find out?
> A. No, sir.
> Q. Was it your duty to find out?
> A. No.
> Q. Are your duties the same as Perry's?
> A. Yes, sir."

Immediately after the accident respondent was carried to the ambulance in a stretcher and, of course, as he testified: "I never had an opportunity to inspect it after the accident happened" (R. 202).

Throughout petitioners' brief it is stated that there was

no evidence that the car door was defective. This statement is false. Further, it is unjustifiably so. Plaintiff's Exhibit 2 (R. 95) is the record of repairs made on the car involved in the accident. The record shows that two completely new doors were made because of the decayed condition of the old ones, and it shows that the other two doors were removed, repaired, and replaced, also on account of their decayed condition. It shows that a considerable number of bolts were "spoiled" which, according to the employee who made the record, is "liable to mean anything, maybe worn out, rusted out" (R. 320). A completely new running board was placed on the car because the old one was decayed (R. 95). The general car foreman inspected the car the next day and found that the accident was caused because the roller was worn and the hanger casting cracked on the inside (R. 196). He stated that the roller was worn enough to permit the door to disengage (R. 206). He made a report to this effect and signed it (R. 196-7). Although the car foreman was still in the employ of the company (R. 130) at St. Louis, where the case was tried (R. 99), he was not produced as a witness, and his absence was unexplained.

The petitioners immediately took possession of the car and issued instructions not to bother or disturb it (R. 99). The car was held on the rip track for the claim agents (R. 99, 328-30, 116). Two claim agents were on the job within a day or two after the accident, and petitioners and their employees had control of the instrumentality of injury (R. 330, 116, 369, 71).

Before the accident occurred, one of the group of four employees who were closing the door, patrolman Smith, climbed up on top of the car and flashed his light there; a hammer was thrown up to him, and he tapped the back of the rollers (R. 142-3). When Smith came down from the top of the car nothing was said about the door being defective, the pieces

of metal being disengaged, the hangers being off the track, or anything of the kind (R. 156, 183). He made no comment (R. 190). It was the duty and custom of these special patrolmen as well as car inspectors to close doors (R. 133). Bell and respondent, both inspectors, were co-equal in authority, and neither had the right to give orders to the other (R. 341).

At the trial Smith claimed that one of the hangers was off the track, but admitted it was something you couldn't possibly see from the ground and said it was not way out at the top and there was not a space between the door (R. 363). It was not part of respondent's duty to inspect the tops of the doors or the hangers and attachments on the doors (R. 133). It would not be customary but would be unusual to get on top to do so (R. 76, 129). You couldn't tell from the ground even with a light that any wheel was off the track (R. 73).

Petitioners' witness Smith, whose hands were on the door at the time, would not say that respondent was exerting any force or pressure on it at all. He testified (R. 364):

> "Q. In other words, from anything you could feel with your hands or from anything you could see, you don't know whether he was actually exerting pressure or not?
>
> A. No, sir.
>
> Q. All you know is that Bell was pulling and you pushing and Perry stood there with the bar?
>
> A. Yes, sir.
>
> Q. Beyond that you can't tell us?
>
> A. No, sir."

Upon the trial petitioners did not produce the general car foreman who made the inspection of the car to determine the cause of the accident, nor did they produce their blue prints, photographs, records, or any other evidence of a credible nature to explain the occurrence. The defense was a purely

technical one based upon obstruction and concealment; it was not based on any genuine claim of non-liability, but upon the contention that the plaintiff was unable to establish the true facts.

The testimony of those witnesses which were produced by the petitioners was so contradictory and so badly impeached and so inconsistent with previous sworn depositions that the trial court and the jury would be justified in rejecting it entirely. We refer especially to the testimony of the witness Archer (R. 322-336) whose demolition was complete.

III.

POINTS AND AUTHORITIES

1.

The Doctrine of Res Ipsa Loquitur Applies in Actions Under the Federal Employers' Liability Act.

Southern Ry. Co. vs. Bennett, 233 U. S. 80, 34 S. Ct. 566.

Delaware, L. & W. R. Co. vs. Hughes, 240 F. 941.

Central R. Co. vs. Peluso, 286 F. 661 (Cert. Den. 261 U. S. 613, 43 S. Ct. 359).

Erie R. Co. vs. Murphy, 9 F. (2d) 525.

Schroble vs. LeHigh Valley R. Co., 62 F. (2d) 993.

Delaware & H. Co. vs. Dix, 188 F. 901.

Philadelphia & R. Ry. Co. vs. Eisenhart, 280 F. 271.

Altman vs. Atlantic Coast Line R. Co., 18 F. (2d) 405.

Baltimore & O. R. Co. vs. Kast, 299 F. 419.

Cochran vs. Pittsburgh & L. E. R. Co., 31 F. (2d) 769.

Didinger vs. Pennsylvania R. Co., 39 F. (2d) 798.

Chesapeake & Ohio R. Co. vs. Smith, 42 F. (2d) 111.

Detroit, T. & I. R. Co. vs. Hahn, 47 F. (2d) 59.

Carpenter vs. B. & O. R. Co. (6 Cir.), 109 F. (2d) 375.

Lowery v. Hocking Valley Ry. Co., 60 F. (2d) 78.
Larussi vs. Missouri Pac. Ry. Co., 155 F. 654.
Missouri Pac. Ry. Co. vs. Larussi, 161 F. 66.
Leathem Smith-Putnam Navigation Co. vs. Osby, 79 F. (2d) 280.
Eker vs. Pettibone, 110 F. (2d) 451.
Terminal Railroad Assn. vs. Staengel, 122 F. (2d) 271.

2.

The Evidence Was Sufficient to Justify the Trial Court in Submitting the Case to the Jury Under the Doctrine of Res Ipsa Loquitur.

a. Cases directly in point.

Cork vs. LeHigh Valley R. Co., 98 N. J. 143, 119 Atl. 88.
Smith vs. St. Louis & S. F. Ry. Co., 95 Kan. 451, 148 Pac. 759.
Rhodes vs. Southern Ry. Co., 188 S. C. 228, 198 S. E. 382.
Pennsylvania R. Co. vs. Hummel, 167 F. 89.
Black vs. St. Joseph & Grand Island Ry. Co., 159 Mo. App. 405.
Louisville & N. R. Co. vs. Burch, 155 Ky. 245, 159 S. W. 782.

b. Cases analogous to the one at bar.

Central R. Co. vs. Peluso (2 Cir.), 286 F. 661 (Cert. Den. 261 U. S. 613, 43 S. Ct. 359).
Eker vs. Pettibone (7 Cir.), 110 F. (2d) 451.
American Car & Foundry Co. vs. Barry (8 Cir.), 195 F. 919.
Peterson vs. Minnesota Power & Light Co., 207 Minn. 387, 291 N. W. 705.

Goldman & Frieman Bottling Co. vs. Sindell, 140 Md. 488, 117 Atl. 866.

Pandjiris vs. Oliver Cadillac Co., 339 Mo. 711, 98 S. W. (2d) 973.

Jenkins vs. Kansas City, 230 Mo. App. 337, 91 S. W. (2d) 98.

McCloskey vs. Koplar, 329 Mo. 527, 46 S. W. (2d) 557.

Thornton vs. Van de Kamps Holland Dutch Bakers, 181 Wash. 213, 42 Pac. (2d) 799.

c. The non-production of available evidence warrants the inference that it would have been unfavorable.

Futrell vs. Arkansas-Missouri Power Corp., 104 F. (2d) 752.

Sears, Roebuck & Co. vs. Peterson, 76 F. (2d) 243.

Leonard vs. St. Joseph Lead Co., 75 F. (2d) 390.

Lincoln Nat. Life Ins. Co. vs. Erickson, 42 F. (2d) 997.

Malouff vs. Pope, 9 F. (2d) 254.

Hill vs. United States, 234 F. 39.

1 *Wigmore, Evidence* (2d Ed.), 285-291.

1 *Jones, Evidence* (2d Ed.), 89.

22 *C. J.,* p. 115, Sec. 56.

Dec. Dig., Trial, 211, 234 (8).

10 *R. C. L.* 884, Sec. 32.

3.

The Questions of Contributory Negligence and Assumption of Risk Were Properly Submitted to the Jury.

Kanawha & M. R. Co. vs. Kerse, 239 U. S. 576.

Texas & Pac. R. R. Co. vs. Archibald, 170 U. S. 665.

C., R. I. & P. Ry. Co. vs. Ward, 252 U. S. 18.

Ches. & O. R. Co. vs. Proffit, 241 U. S. 462.

Schlemmer vs. Buffalo, P. & P. R. Co., 205 U. S. 1.

Missouri Pac. R. Co. vs. Siratt (8 Cir.), 78 F. (2d) 253.

Davis vs. Crane (8 Cir.), 12 F. (2d) 355.

Northern Pac. Ry. Co. vs. Berren (9 Cir.), 73 F. (2d) 687.

Birmingham Belt R. Co. vs. Dunlap (5 Cir.), 58 F. (2d) 951.

C., N. O. & T. P. Ry. Co. vs. Thompson (6 Cir.), 236 F. 1.

Cross vs. C., B. & Q. R. Co., 191 Mo. App. 202, 186 S. W. 1130.

IV.

ARGUMENT

Prefatory Statement.

In deference to the rule of this Court requiring the abbreviation of briefs, no attempt will be made to follow the confused and unnecessarily extended argument of the petitioners. We shall not seek to overwhelm the Court with the citation of a very plethora of authorities, nor shall we burden the members of this Court with quotations from ancient cases whose doctrines have long since been discarded.

1.

The Doctrine of Res Ipsa Loquitur Applies to the Present Action.

At common law the fellow-servant doctrine prevented the application of *res ipsa* to the master and servant relationship. This ancient rule still obtains in actions at common law such as many of those referred to and quoted from in petitioners' brief. Where the fellow-servant doctrine has been abolished, and particularly when contributory negligence is no longer a complete defense, the obstacle to the application of *res ipsa* is taken away.

When the Federal Employers' Liability Act was adopted, it specifically abrogated the fellow-servant rule and, further, it expressly adopted the rule of comparative negligence, so that contributory negligence no longer constituted a bar to the action but went only in diminution of damages. As said in *Leathem Smith-Putnam Navigation Co. vs. Osby* (7 Cir.), 79 F. (2d) 284 (Cert. Den. 296 U. S. 653):

> "By the Federal Employers' Liability Act, which governs here, the defenses based upon the fellow-servant rule and contributory negligence have been abolished except that the latter may mitigate damages. Consequently, the doctrine of *res ipsa loquitur*, is unhampered in its application."

So, also, in *Carpenter vs. B. & O. R. Co.* (6 Cir.), 109 F. (2d) 375, it was said:

> "In view of the fact that the Employers' Liability Act abrogated the common law fellow-servant rule by placing negligence of a co-employe upon the same basis as negligence of the employer, in our opinion the falling of the weight under the circumstances of this case in itself was some substantial evidence of negligence on the part of appellee."

Exactly the same result was reached in *Central R. Co. vs. Peluso* (2 Cir.), 286 F. 661, and in the course of the opinion it was expressly stated that this Court had left unimpaired the doctrine of *res ipsa* as between employer and employee where the circumstances warranted it. Your Honors denied a writ of certiorari in 261 U. S. 613. In *Baltimore & O. R. Co. vs. Kast*, 299 F. 419, where the same subject was involved, the Court noted that a petition for certiorari in the *Peluso* case based solely upon the ground involved in the case at bar was denied. Having denied the writ in the *Osby* and *Peluso* cases, there is no occasion for the issuance of one in the case at bar.

In fact, there is no confusion on this subject at all. The decisions in the various circuits are perfectly uniform, and

counsel have been unable to cite a single decision in the Federal courts where it has been held that the doctrine cannot be applied under the Federal Employers' Liability Act. One of the most recent decisions wherein *res ipsa* was applied in such a case is *Eker vs. Pettibone* (7 Cir.), 110 F. (2d) 451, which is applicable here on the merits as well as upon general principles.

Typical of the decisions relied upon by petitioners is *Patton vs. Texas & Pac. Ry. Co.*, 179 U. S. 658, which was tried forty years ago and long before the passage of either the Employers' Liability Act or the Safety Appliance Act. The fellow-servant doctrine was then in full force and effect. Patton was barred from recovery by contributory negligence, which was then a complete defense. In sustaining the decision of the two lower courts, the Supreme Court remarked that while an accident itself might carry a presumption of negligence as to a passenger of a carrier, it does not do so as to an employee. The *Patton* case has been later distinguished by this Court and other courts throughout the country, and while it contained a sound exposition of the law at the date of its decision, it is not authority for the view that *res ipsa* can never apply between master and servant.

In fact, decisive and controlling on this phase of the controversy is *Southern Ry. Co. vs. Bennett*, 233 U. S. 80. In an action under the Federal Act it appeared that the deceased was killed when his engine fell through a burning trestle. The trial court instructed the jury that where a servant is injured through defective instrumentalities, it is *prima facie* evidence of the master's negligence, and that the master assumes the burden of showing that he exercised due care in furnishing them. In sustaining the judgment for plaintiff and in holding that this instruction was not reversible error, this Court said:

"Of course, the burden of proving negligence in a strict sense is on the plaintiff throughout, as was recognized and stated later in the charge. The phrase picked out for criticism did not controvert that proposition, but merely expressed in an untechnical way that, if the death was due to a defective instrumentality and no explanation was given, the plaintiff had sustained the burden. The instruction is criticised further as if the Judge had said *res ipsa loquitur*—which would have been right or wrong according to the *res* referred to. The Judge did not say that the fall of the engine was enough, but that proof of a defect in appliances which the company was bound to use care to keep in order, and which usually would be in order if due care was taken, was *prima facie* evidence of neglect. The instruction concerned conditions likely to have existed for some time (defective ash pan or damper on the engine and rotten wood likely to take fire), about which the company had better means of information than the plaintiff, and concerning which it offered precise evidence, which, however, did not satisfy the jury."

In the case at bar there was undisputed evidence of defective appliances which the master was bound to use due care to keep in order, and which usually would be in order if the employees at originating terminals and on the rip track had exercised due care. The defects, rotten wood and corroded metal, were of a nature to imply negligence because those under a duty to use care to keep wood and metal in reasonably safe condition are charged with notice of the tendency of the one to decay and the other to corrode.

2.

The Evidence Was Sufficient to Warrant the Submission of the Case to the Jury Under Res Ipsa Loquitur.

We shall not confuse respondent's alleged duty, if any, to discover the defect, that is, his contributory negligence, or his knowledge and appreciation thereof, that is, assumption of risk, with the question of defendants' negligence. The other two subjects will be discussed under the appropriate heading, and we are now concerned only with the evidence of defendants' negligence.

It was clearly established that a defective condition existed of a nature to have continued over a considerable period of time. It was established that defendants maintained employees and special equipment to discover and remedy this type of defect. It was further established that in the experience of employees extending over thirty years an accident of this type had never happened and could never happen without such a defective condition. The car door was at all times in the possession and control of petitioners, both before and after the accident. Respondent's conduct had no causal connection with the accident. He was exerting no control over the instrumentality that could have caused it to fall.

Respondent was only one member of a group of four who were co-equal in authority and in the performance of duty. If, contrary to the actual fact, it be assumed that he was exerting force and pressure, then so were the other employees, and at least three-fourths of the control and three-fourths of the negligence, if it be such to perform their duty, was attributable to petitioners. The petitioners took possession of the car door after the accident and retained such possession and control at all times until the trial. They did not produce in court the offending instrumentality.

They had exclusive means of information to ascertain the precise defect, and they had exclusive access to the evidence with respect to the cause of the accident.

The trial judge carefully conditioned the application of *res ipsa* upon the following findings (R. 450-2):

1. That the car door would not have fallen if it had been in good repair.

2. That the defective condition of the door caused it to fall.

3. That the means of knowing the defect was exclusively and entirely within the knowledge and control of defendants and was not known by plaintiff or readily determinable by him.

4. That the door would not have fallen except for the negligence of the defendants.

5. That the act of the plaintiff was not the proximate cause of the door falling.

This is not only sound law but is consonant with fairness and justice.

Petitioners' counsel should not permit their zeal to control their veracity. We have shown that their statement that there was no defect in the car door is wholly unfounded and that, in truth and in fact, the repair records and the oral and written admission of Poffenberger, the general car foreman, establish both rotten wood and defective metal as the cause of the accident. The admission of the general car foreman is substantive evidence.

See *Chicago, St. P., M. & O. R. Co. vs. Kulp*, 102 F. (2d) 352 (Cert. Den. 307 U. S. 636).

It should be noted that respondent had less control over the door that injured him than did Peluso over the crane which overturned on him. Because the jury found that

Peluso's acts did not cause the crane to overturn, *res ipsa loquitur* applied in that case, and because the jury has found that respondent's acts did not contribute to the occurrence of the accident, *res ipsa loquitur* applies in this case. In *Eker vs. Pettibone* (7 Cir.), 110 F. (2d) 451, where an engineer was killed by the derailment of his engine, but it was shown that it was not his speed or control which caused the accident, in rejecting petitioner's argument, it was said:

> "True, the decedent, as the engineer, had control of the speed of the engine, but he had no more control and was no more responsible for the proper functioning of the pony trucks, which caused the accident, than was the fireman, brakeman or conductor."

In many cases it has been pointed out that control does not mean actual physical control at the moment of the accident but refers to control and the right of control *at the time the negligence was committed.* The car door was in defendants' control for days, weeks and months before the accident, and this was when the defective condition was slowly occurring by reason of negligence. The overwhelming majority of the courts have rejected the rigid concept of control and have adopted the more reasonable rule that ownership, possession and control at the time of the negligence is the vital factor.

The bald statement that it is undisputed that respondent had actual physical control of the door is unwarranted. The other three employees were actually doing the pushing and pulling at the time of the accident, and respondent merely held the bar in place (R. 158, 275-6, 364).

The claim that petitioners had no means of knowledge concerning the condition of the door is obviously untrue. They had possession of it both before and after the accident. They inspected it, probably photographed it, repaired it, and had the most full and complete access to the door, the hanger,

the track and all the other equipment. The authorities all agree that a very important factor is the possession of superior knowledge and evidence concerning the cause of the accident.

In support of these statements we direct attention particularly to:

Eker vs. Pettibone (7 Cir.), 110 F. (2d) 451.

Peterson vs. Minnesota Power & Light Co., 207 Minn. 387, 291 N. W. 705.

Pandjiris vs. Oliver Cadillac Co., 339 Mo. 711, 98 S. W. (2d) 973.

Central R. Co. vs. Peluso (2 Cir.), 286 F. 661 (Cert. Den. 261 U. S. 613).

I. C. R. R. vs. Brickett, 109 Ill. App. 468, 474.

We forbear discussion of those cases which are directly in point and which will be found under point 2, subdivision a, on page 9 of this brief, but we note with interest that the court below cited, relied upon, and quoted from the *Cork* case from New Jersey and the *Smith* case from Kansas, both of which are on all fours with the case at bar.

The case of *Copeland vs. Chicago, B. & Q. R. Co.*, 293 F. 12, relied upon by petitioners, did not involve the doctrine of *res ipsa loquitur*. The complaint in that case alleged specific allegations of negligence. Having pleaded negligence specifically, it was up to the plaintiff to prove it specifically. The case involved only the sufficiency of the evidence to establish specific negligence, with which we are not here concerned. The *Copeland* case is otherwise distinguishable. It involved a charge of negligent inspection, and the only railroad companies sued were connecting and delivering carriers. The owning carrier was not joined. As to connecting and delivering carriers, one of whom had possession of the car only for a few hours, it was held there could be no negligence in failing to discover a latent and hidden defect.

Each case cited by petitioners in the argument is distinguishable. The quotation from Judge Woodrough's opinion in *F. W. Martin & Co. vs. Cobb*, 110 F. (2d) 159, had reference to a case under the common law of Arkansas and not under the Federal Employers' Liability Act. So, also, the statement of Judge Sanborn from the case of *Northern Pac. Ry. Co. vs. Dixon*, 139 F. 737, related to an accident occurring December 25, 1899, long before the enactment of the Federal statute here involved, and when the doctrines of contributory negligence and fellow-servant were in full effect. In fact, the non-application of *res ipsa* was based expressly by Judge Sanborn upon the existence of these defenses, now abolished. These early cases, the *O'Brien*, the *Cryder*, the *Dixon*, the *Patton* and the *Fulgham*, were cited by the same court in *American Car & Foundry Co. vs. Barry*, 195 F. 919. Then, in the later decision of the Eighth Circuit Court of Appeals in *Kaemmerling vs. Athletic Mining & Smelting Co.*, 2 F. (2d) 574, the early cases are discussed, explained and distinguished. It was said in the concurring opinion:

> "When the fellow-servant rule is abolished the doctrine of *res ipsa loquitur* may properly be applied as between master and servant."

The distinction between the cases where the doctrine has no application to this relationship and the cases where it does and may apply is clear and obvious to everyone, apparently, except petitioners' counsel. In an attempt to create a conflict between the decision in the case at bar and *Southern Ry. Co. vs. Stewart*, 119 F. (2d) 85, it is assumed by petitioners that the latter decision holds that the failure of a safety appliance to work properly constitutes no evidence of a defect or of negligence. The *Stewart* case holds nothing of the kind. The *Stewart* case holds that the operating efficiency of the appliance is the test to determine whether the law has been violated. In that case there was no evidence

that the deceased switchman had attempted to operate the appliance in the usual and customary manner. There was no evidence that anyone attempted to operate the appliance in the usual, proper and customary manner, but the Court indicated that had there been sufficient evidence that the appliance did not operate satisfactorily, a violation of the Act would have been shown. There is thus no conflict or inconsistency between the decision in the *Perry* case and the *Stewart* case.

Where wood is so rotten and metal so corroded that a car door weighing 400 pounds will fall from its attachments because a group of employees pull and push on it in the usual, proper, customary way—employees who in thirty years of experience never had it happen before—such occurrence, in the absence of explanation, permits of an inference that the workmen at originating terminals and on the rip track, who were employed and supplied with equipment for the purpose of discovering and remedying such defects, had not exercised due care.

3.

The Questions of Contributory Negligence and Assumption of Risk Were Properly Submitted to the Jury.

Smith, who climbed up on top, did not tell either respondent or Shewmon that the hanger was off (R. 156, 183, 190, 354). Even after being on top, Smith did not know the door was defective; he claimed he saw the hanger off but did not look to see what caused it (R. 363). Surely respondent could assume Smith would look carefully enough to find anything dangerous and would notify plaintiff and his co-employees. Shewmon did not expect an accident to happen and was not alarmed (R. 355-6); respondent did not believe there was any possibility of the door falling (R. 189).

The statement by petitioners' counsel that it conclusively

appears that it was respondent's duty to inspect the door and its appliances is false. Exactly the contrary is true (R. 76, 129, 133, 136, 345). Running inspections but not top inspections were made at Moberly (R. 124-8, 133).

Three days after the accident respondent stated to the claim agent, "Every day we close doors of this kind with a bar, and we always do it in the manner I was doing it, and we considered this a safe practice" (Defendants' Exhibit "B," R. 371).

That the accident was exceedingly rare (R. 39, 49, 55, 56, 70, 71, 180, 316); that it was not respondent's duty to inspect the tops of doors (R. 76, 129, 123), but was the duty of other employees in other places (R. 103, 124, 129, 133, 136, 205), has already been sufficiently covered.

The assertion that respondent may have pried the door loose and was wrenching and prying up at the moment of the accident is contrary to petitioners' own evidence (R. 349, 364; see, also, 157-8). Respondent did not and could not pry the door off the attachments (R. 66, 67, 70, 118, 272) even though one hanger is off the track (R. 77-8). He merely took up the slack and held the bar still so the other employees could close the door (R. 157, 158, 275, 276, 364) in the usual and customary manner (R. 39, 44, 65, 145, 146). When the door fell, three other men had to get out of the way first and respondent couldn't escape (R. 159). He couldn't possibly have seen the conditions from the ground (R. 363), even with his lantern (R. 73, 178, 179).

Hoff testified that you are handicapped at night, and even though the wheel was off the track you couldn't tell it from the ground (R. 73). Bell had a carbide light (R. 177). Respondent had an old type oil lantern with a reflector (R. 136-7); and the night was a dark one (R. 131).

Unless the evidence is clear and uncontradicted and from unimpeached witnesses, and is such that all reasonable men

must come to but one conclusion, the questions of contributory negligence and assumption of risk are for the jury.

Risks arising from the negligence of the master are not assumed in the absence of actual knowledge. Assumption of risk is an affirmative defense and the burden to establish it is on the master, and as said by Justice Holmes in *Schlemmer vs. Buffalo P. & P. R. Co.*, 205 U. S. 1, great care should be taken lest the servant's rights be sacrificed by charging him with assumption of risk under the name of contributory negligence. The authorities will be found under section 3 of Points and Authorities. We forbear any discussion of them for the reason that upon the record made we believe such questions are not properly before this Court. The only question, as noted by the Circuit Court of Appeals, is whether the doctrine of *res ipsa loquitur* was properly applied by the trial court, and we mention the subjects of assumption of risk and contributory negligence only because of the confusion arising from petitioners' injection of them into their brief.

V.

CONCLUSION

In the *Patton* case, upon which petitioners place such great emphasis, it was said:

> "Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. * * * And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions."

If this be true when the failure to direct a verdict is involved, how much more so should this principle govern a decision when nothing is involved except a rule of evidence,

res ipsa loquitur, which is usually called a mere procedural device. This Court is asked to issue a writ of certiorari and to review the decision below so that this case may be tried anew. The trial judge followed the ruling of this Court in *Southern Ry. Co. vs. Bennett*, 233 U. S. 80, which has definitely decided that *res ipsa loquitur* does and may apply to an action under the Federal Employers' Liability Act. Therefore, this question having already been determined by this tribunal in an important case that has been cited and followed in both State and Federal courts all over the country, the only purpose that could be served by a review of the case at bar would be to determine the applicability or the non-applicability of the doctrine to this case on its own special, factual background. The decision would thus be limited to the particular facts of this particular lawsuit.

It is respectfully submitted that the case was correctly determined in the courts below by the application of principles of law that are clear and well established, and in the light of the matters thus presented, the present application falls very short of the requirements prescribed by the rules of this Court governing the granting of Writs of Certiorari.

The petition should accordingly be denied.

Respectfully submitted,

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